RECORD AND BRIEFS

OCT 23

No. 15-1439

IN THE

Supreme Court of the United States

CYAN, INC., *et al.*,
Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et al.*,
Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization with members and supporters nationwide. Since its founding in 1971, Public Citizen has appeared before Congress, administrative agencies, and courts on a wide range of issues and worked for enactment and enforcement of laws protecting consumers, workers, and the public.

Public Citizen has a longstanding interest in the proper construction of statutory provisions defining and limiting the jurisdiction of the federal courts. The resolution of such issues often has significant impacts on the efficacy of statutory and common-law remedies under both state and federal law, as well as on the allocation of power in our federal system and the proper implementation of congressional intent. Public Citizen frequently appears as an amicus curiae before this Court in cases involving important issues of federal jurisdiction, including questions of removal jurisdiction and jurisdictional issues under the Securities Act of 1933, the Securities Exchange Act, and the Securities Litigation Uniform Standards Act of 1998 (SLUSA).[2]

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[1] Pursuant to Rule 37.6 of this Court, amicus curiae states that this brief was not written in whole or in part by counsel for a party and that no one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from both parties consenting to all amicus briefs are on file with the Clerk.

[2] *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562 (2016); *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (2014); *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142 (2007); *see also Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006) (Public Citizen attorneys as counsel for amici law professors in SLUSA case).

SUMMARY OF ARGUMENT

The question presented in this case is whether SLUSA deprived state courts of their long-standing concurrent subject matter jurisdiction over claims raised under the Securities Act of 1933 ("1933 Act"). As respondents' brief explains, the answer to that question is no.

In encouraging this Court to grant certiorari, the federal government agreed that state courts retain concurrent jurisdiction, but also introduced an issue not raised by the parties or addressed by the court of appeals below: whether section 16(c) of SLUSA, 15 U.S.C. § 77p(c), amended the 1933 Act's longstanding anti-removal provision to create removal jurisdiction not only for class actions that assert state-law claims precluded by SLUSA, but also for class actions filed in state court based solely on the 1933 Act.

The Court should decline to reach this argument, which has now also been addressed by the parties and several of petitioners' amici, because it is not necessary to resolve the question presented. To the extent it considers the argument, however, the Court need look no further to reject it than the plain language of the statute, as consistently interpreted by this Court's decision in *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 646 (2006), and seven courts of appeals. In *Kircher*, eight Justices of this Court agreed that under a "straightforward reading" of section 77p(c), the "removal and jurisdiction to deal with removed cases is limited to those precluded by the terms of subsection

(b)." *Id.* at 643.[3] No other reading is consistent with the text, and no amendment of the text is necessary to honor Congress's intent.

Section 77p(c) allows removal of class actions only "as set forth in subsection (b)." Subsection (b) of section 77p, in turn, applies only to certain class actions that include claims brought under state or local law. Therefore, section 77p(c) allows removal only of class actions that include claims brought under state or local law. This "straightforward reading," *Kircher*, 547 U.S. at 643, is consistent with the expressed purpose of the SLUSA amendment to the 1933 Act's anti-removal provision: to allow defendants to choose the forum that will determine whether state law class claims are precluded under section 77p(b). Nothing in the legislative history indicates that Congress intended to otherwise modify the long-standing bar on removal of 1933 Act claims, and the Court should not presume such an intention.

In short, if the Court concludes that class actions containing only claims under the 1933 Act are not precluded by section 77p(b), they are also not removable under 77p(c).

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[3] Although Justice Scalia only joined part of the Court's opinion, his disagreement with this part of the opinion was based on reviewability, not the merits. 547 U.S. at 648-49 (Scalia, J., concurring).

ARGUMENT

I. The Court should not use this case as a vehicle to interpret a removal provision not at issue.

In response to this Court's invitation for the views of the Acting Solicitor General, the government espoused a position advanced by neither party. As to the actual question presented by petitioners, the government agreed with the California Court of Appeal and respondents that 15 U.S.C. § 77v(a), as amended by SLUSA, does not deprive state courts of their longstanding concurrent jurisdiction over actions brought solely under the 1933 Act. *See* U.S. CVSG Br. at 6-12. Departing from both a textual analysis and the positions advanced by the parties, however, the government also argued that, to harmonize the language of section 77v(a) with the policy goals of SLUSA, the Court should construe SLUSA, 15 U.S.C. § 77p(c), as allowing removal of class actions that allege only 1933 Act claims.

This atextual argument was neither raised nor resolved below. Indeed, respondents never attempted to remove this action and long ago waived any opportunity to remove: They were served on April 9, 2014, and had thirty days to remove the action pursuant to 28 U.S.C. § 1446(b). Rather than doing so, they elected to file numerous motions and litigate the merits in state court. The motion for judgment on the pleadings that raised the concurrent jurisdiction issue that is actually presented by petitioners was not filed until fourteen months after service and even then did not argue that the case was or would have been removable. Rather, petitioners expressly argued in the lower courts that section 77p(c) did *not* provide a basis for

removal in this case.[4] Thus, this case does not present the question whether a federal court would possess removal jurisdiction.

Moreover, there are no "compelling reasons" for this Court to review the question of removability of class actions raising only 1933 Act claims. *See* Rule 10. The courts of appeals that have addressed the issue are unanimous in rejecting the government's position and holding that the universe of actions removable pursuant to section 77p(c) is coextensive with the universe of actions with claims precluded by 77p(b).[5] And

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[4] *See, e.g.*, Memorandum of Points and Authorities in Support of Cyan Defendants' Motion for Judgment on the Pleadings for Lack of Subject Matter Jurisdiction 10-11 (filed Aug. 25, 2015); Cyan Defendants' Reply in Support of Their Motion for Judgment on the Pleadings for Lack of Subject Matter Jurisdiction 1-2 (filed Oct. 16, 2015).

[5] *See, e.g.*, *Hidalgo-Velez v. San Juan Asset Mgmt., Inc.*, 758 F.3d 98, 103 (1st Cir. 2014) ("These symbiotic provisions are mirror images of each other: any action that is properly removable under the removal provision is per se precluded under the preclusion provision and, conversely, any action not so precluded is not removable."); *Campbell v. Am. Int'l Grp., Inc.*, 760 F.3d 62, 64 (D.C. Cir. 2014) ("Removal under subsection (c) is for a specific purpose: when a case is removed to federal district court under that provision, the court's jurisdiction is confined to examining whether the action in fact falls within subsection (b)'s scope of preclusion."); *Madden v. Cowen & Co.*, 576 F.3d 957, 965 (9th Cir. 2009) ("[A]ny suit removable under SLUSA's removal provision, § 77p(c), is precluded under SLUSA's preclusion provision, § 77p(b), and any suit not precluded is not removable."); *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 615-16 (7th Cir. 2012) (any suits "properly removed under SLUSA must be dismissed" as they are necessarily based on precluded state law); *Sofonia v. Principal Life Ins. Co.*, 465 F.3d 873, 876 (8th Cir. 2006) (listing elements for removability, including basis in state law); *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395

the decisions of those courts are entirely consistent with this Court's decision in *Kircher*.

For these reasons, the Court should not depart from its rule that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Rule 14.1(a); *see also Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 n.16 (2016); *Glover v. United States*, 531 U.S. 198, 205 (2001). To the extent this Court's detailed discussion of SLUSA's removal provision in *Kircher* needs further clarification, the Court should await a case where the issue was raised below and where its decision is necessary to the outcome.

II. Section 77p(c) only authorizes removal of precluded state-law actions.

Should the Court address the issue raised by the Acting Solicitor General, the Court should confirm that it meant what it said in *Kircher*. There, the Court recognized that, under a "straightforward reading" of section 77p, "removal and jurisdiction to deal with removed cases is limited to those precluded by the terms of subsection (b)." 547 U.S. at 643. Thus, although petitioners are correct that "preclusion and jurisdiction are two different things," Pet. Br. at 13, 43, this Court has already explained that SLUSA was designed so that the preclusion and jurisdictional provisions apply to the same set of claims. The text and structure of the statute compel this reading, particularly in light of this Court's traditional view that removal statutes are to be strictly construed against federal jurisdiction. *See, e.g., Breuer v. Jim's Concrete of Brevard, Inc.*, 536

F.3d 25, 33 (2d Cir. 2005), *vacated on other grounds*, 547 U.S. 71 (2006) (same); *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1092 (11th Cir. 2002) (same).

U.S. 691, 697 (2003); *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002) *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109 (1941).

Indications of Congress's purposes confirm this straightforward reading. The legislative history demonstrates that Congress intended SLUSA's amendments to the 1933 Act's long-standing anti-removal provision to do only one thing: allow defendants to remove those state law-based class actions "set forth in subsection (b)," 15 U.S.C. § 77p(c), so that a federal court can determine whether they are precluded. *See also Kircher*, 547 U.S. at 646. Accordingly, actions arising solely under the 1933 Act are not removable pursuant to section 77p(c).

A. The plain language of section 77p indicates that only certain state-law class actions are removable.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101 (2012) (internal quotation marks omitted). This canon is particularly applicable here, as section 77p(c) is one of three interrelated, mutually cross-referencing provisions. Taken together, these three provisions show a broad *bar* on removal, which has been amended by SLUSA to create a narrow carve-out for a subset of actions that is coterminous with those that contain claims that the statute precludes.

The first of these provisions is the longstanding "removal bar," 15 U.S.C. § 77v(a)—a member of "a rather exclusive club of federal non-removal provi-

sions"—that was enacted in 1933. Jeffrey T. Cook, *Recrafting the Jurisdictional Framework for Private Rights of Action Under the Federal Securities Laws*, 55 Am. U. L. Rev. 621, 633 (2006). As amended by SLUSA, the relevant passage in section 77v(a) states:

> Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

The SLUSA-added section 77p(c) (the "removal provision"), in turn, cross-references subsection 77p(b), and states that:

> Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

Finally, subsection 77p(b) (the "preclusion provision") provides:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging —
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

The preclusion provision thus "sets forth" a defined set of covered class actions containing state statutory or common law claims, and precludes those claims. The removal provision provides that this same set—and only this same set—of precluded class actions is removable. *See Kircher*, 547 U.S. at 642 ("we read authorization for the removal in subsection (c), on which the District Court's jurisdiction depends, as confined to cases 'set forth in subsection (b)'"). And the amendments to the removal bar were necessary to eliminate any conflict and make clear that class actions containing the newly precluded, removable claims, are not subject to the removal bar.[6]

The government's novel position—that section 77p(b) does not preclude state-court actions based solely on the 1933 Act but section 77p(c) nonetheless makes those actions removable—has no basis in the statutory text and is inherently contradictory. The only removable cases are "covered class action[s]

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[6] No one, including the government, argues that allowing removal of state cases that are based *exclusively* on the 1933 Act is necessary to give meaning to this addition of the phrase "except as provided in section 77p(c)" to section 77v(a). As petitioner's *amici* and respondent note, section 77p(c) authorizes removal of "mixed" cases—those alleging both precluded state-law claims and 1933 Act claims. *See* Brief for Former SEC Commissioners at 14 n. 4; Brief of Alibaba Group at 5; Respondent's Br. at 17; *see also In re Tyco Int'l., Ltd.*, 322 F. Supp. 2d 116, 120 (D.N.H. 2004) ("SLUSA's amendment to § 77v ... was needed to eliminate any doubt about the removability of cases that include both state law claims and otherwise nonremovable claims based on the Securities Act"). Together, the provisions give defendants the option to have a federal forum decide whether and to what extent state-law claims are precluded when a "mixed" class action case asserting both covered state-law claims and federal 1933 Act claims is filed in state court.

brought in any State court involving a covered security, *as set forth in subsection (b)*" (emphasis added). The most natural reading of the term "as set forth in subsection (b)" is that the universe of removable actions under 77p(c) is coextensive with those subject to "subsection (b)." And to be subject to subsection (b), a suit must meet three criteria: it must (1) be a "covered class action" as that term is defined in 15 U.S.C. § 77p(f)(2); (2) be based upon state or local law; and (3) allege claims of untruth or deception. If the presence of all three criteria are prerequisites to coverage by subsection (b), they are logically also necessary to qualify under the narrow exemption of subsection (c).

The government conceded that satisfaction of each of these criteria is required for purposes of preclusion under subsection (b), and thus that subsection (b) applies only to actions "brought under state law, and [] has no meaningful application" to suits brought solely under the 1933 Act. U.S. CVSG Br. at 7. Yet the government proceeded to argue that section 77p(c) is somehow "best understood" to apply to actions that meet only the first and third of these criteria. *Id.* at 14.

The phrase "as set forth in subsection (b)," however, cannot logically be read to selectively incorporate only *some* of the elements from section 77p(b). Indeed, the government does not explain how the text does so, and to suggest that the "based upon state or local law" requirement does not apply "entirely ignores half of the provision." *Parker v. Nat'l City Corp.*, No. 1:08 NC 70012, 2009 WL 9152972, at *5 (N.D. Ohio Feb. 12, 2009) (interpreting section 77p(c)). If the phrase "as set forth in subsection (b)" incorporates the criteria of subsection (b) into subsection (c)—as everyone seems to agree—it must incorporate all of them. *Cf. Kircher*,

547 U.S. at 643 ("We do not read statutes in little bites.").

The final clause of section 77p(c) is strong evidence that although preclusion and jurisdiction are distinct concepts, Congress intended to tie the two together here. The clause thus further illustrates the error of the government's reading. *Cf. United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme ... because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."). The final clause specifies that, upon removal, cases removed pursuant to section 77p(c) "*shall be subject to* subsection (b)"—*i.e.*, dismissed as precluded. Yet the government does not argue that, if a class action asserting only 1933 Act claims is removable, a federal court may, or must, dismiss the 1933 Act claims as precluded. *Cf.* Pet.'s Br. at 17 ("The preclusion provision addresses *state-law* covered class actions[.]") (emphasis in original). And any such argument would find no support in the legislative history, which offers no evidence that, in enacting SLUSA, Congress intended federal courts to dismiss 1933 Act claims. Indeed, that notion is contrary to the purpose of the preclusion clause.

In its petition-stage brief, the government did not address the statutory consequence of reading section 77p(c) to allow removal of actions alleging only 1933 Act claims—that is, that those claims would then be subject to dismissal as "precluded." But if the Court were to abandon the straightforward reading of the statute as to which actions are removable, it would need to undertake interpretative gymnastics to give

some other meaning to the "shall be subject to subsection (b)" language of section 77p(c). The more reasonable approach is to construe the scope of the removal clause based on its plain language. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."); *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible.").

B. The statute's plain language is consistent with congressional intent to link preclusion and removal jurisdiction.

As the Court unanimously recognized in *Kircher*, a plain-meaning, logical reading of section 77p(c) produces no internal inconsistencies:

> A covered action is removable if it is precluded, and a defendant can enlist the Federal Judiciary to decide preclusion, but a defendant can elect to leave a case where the plaintiff filed it and trust the state court (an equally competent body, see *Missouri Pacific R. Co. v. Fitzgerald*, 160 U.S. 556, 583 (1896)) to make the preclusion determination.

547 U.S. at 646.

Petitioners acknowledge the correctness of *Kircher*'s point, noting that section 77p(c) was adopted "just in case state courts are not faithful to [the] preclusion provision ... allowing the preclusion determination to be made by the federal court." Pet. Br. at 7;

see also id. at 17; Shannon Rose Selden, *(Self-) policing the Market: Congress's Flawed Approach to Securities Law Reform*, 33 J. Legis. 57, 79 (2006) ("Congress (and the corporate lobby) feared that if class actions alleging state fraud claims were preempted but not removed, extensive litigation over whether or not the claims were covered could still continue in state court."); A.C. Pritchard, *Constitutional Federalism, Individual Liberty, and the Securities Litigation Uniform Standards Act of 1998*, 78 Wash. U. L.Q. 435, 490 (2000) (noting removal of precluded state law actions serves dual purposes: "(1) it allows federal courts to interpret the scope of preemption, thus enhancing uniformity; and (2) it triggers the Reform Act's stay of discovery.").

Under this reading, sections 77p(b) and 77p(c) work together to give defendants an option: remain in state court and move to dismiss any covered state-law claims as precluded, or remove the case to federal court and make a motion to dismiss the covered state-law claims on those grounds. *See Kircher*, 547 U.S. at 646. This case is thus not one where the Court needs to reject a plain-language interpretation of statutory language to give a statutory provision a sensible meaning. *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976) ("the language of a statute controls when sufficiently clear in its context"). Read to allow removal only of class actions that contain precluded state-law claims, section 77p(c)'s removal jurisdiction plainly serves a purpose—the purpose Congress intended it would serve.

The legislative history confirms that Congress's amendment to the removal bar was linked to the insertion of the preclusion provision. The House Report stated: "This provision is designed to prevent a State

court from inadvertently, improperly, or otherwise maintaining jurisdiction over an action that is preempted pursuant to subsection (b)." H.R. Rep. 640, 105th Cong., 2d Sess. (1998), p. 16. And the Senate explicitly stated that SLUSA was designed "to prevent *state* laws from being used to frustrate the operation and goals of the [PSLRA]." S. Rep. 182, 105th Cong., 2d Sess. (1998), p.2. *See also* H. Conf. Rep. 803, 105th Cong., 2d Sess. (1998), p. 1 (purpose of SLUSA is "to limit the conduct of securities class actions under State law"); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 88 n. 13 (2006) (noting that the "evident purpose" of SLUSA was "to limit the availability of remedies under state law"). There is no indication that Congress intended for section 77p(c) to have any bearing on actions arising solely under federal law claims.

Despite the plain language and clear legislative history, the government argues for a different reading because, in its view, Congress "would not likely have denied defendants access to a federal forum for adjudication of the merits of [] 1933 Act claims." U.S. CVSG Br. at. 14. "But we take the Act as Congress gave it to us, without attempting to conform it to any notions of what Congress would have done." *W. Union Tel. Co. v. Lenroot*, 323 U.S. 490, 501 (1945); *see also Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). And even looking beyond the statutory text, there is no reason to speculate about what Congress would "likely" have wanted when the legislative history contradicts that speculation. Tellingly, the government's petition-stage brief provided no citation to the legislative record, or any other authority, for its suppositions about what Congress would have

wanted. On the other hand, both logic and the legislative history provide ample reason to believe that Congress wanted to provide for removal as a mechanism for ensuring enforcement of SLUSA's preclusion of covered state-law class actions, without eliminating the longstanding prohibition on removal of 1933 Act claims. *See* Jordan A. Costa, Note, *Removal of Securities Act of 1933 Claims After SLUSA: What Congress Changed, and What It Left Alone*, 78 St. John's L. Rev. 1193, 1218, 1221–23 (2004) (examining potential reasons why Congress in SLUSA did not provide for removal jurisdiction of 1933 Act claims); *see also Christians v. KemPharm, Inc.*, --- F. Supp. 3d ---, No. 3:17-CV-00002, 2017 WL 3017192, at *10 (S.D. Iowa July 17, 2017) (concluding Congress lacked any intent with respect to removal of federal claims).

The context of the removal bar also makes it particularly unlikely that Congress would have created removal jurisdiction for actions containing only 1933 Act claims without explicitly saying so. The removal bar has, since its enactment in 1933, stood out as unusual. *See* Cook, 55 Am. U. L. Rev. at 633. Given the visibility and longevity of the removal bar, it would have been extremely peculiar for Congress to have attempted, for the first time, to provide for removal of purely 1933 Act actions without *any* explicit statement in the statute or any mention of its intentions in the legislative record. *See In re Waste Mgmt., Inc. Sec. Litig.*, 194 F. Supp. 2d 590, 596 (S.D. Tex. 2002) ("More important, there is no express statement by Congress that it was modifying the traditional rule prohibiting removal of cases brought under the 1933 Act. Congress could easily have made a statement in SLUSA expressly modifying this provision had it so intended.").

For eighty years, the removal bar has undisputedly prohibited defendants from removing actions exclusively raising 1933 Act claims to federal court—thereby "den[ying] defendants access to a federal forum for adjudication of the merits of [] 1933 Act claims." U.S. CVSG Br. at 14. In enacting SLUSA in 1998, Congress was well aware of the longstanding removal bar and reaffirmed it except to the extent modified by section 77p(c). "Had Congress intended to authorize the removal of every covered class action involving a covered security, it could easily have provided that 'any covered class action brought in any State court involving a covered security shall be removable.'" *Appert v. Morgan Stanley Dean Witter, Inc.*, 673 F.3d 609, 615 (7th Cir. 2012); *see also Parker*, 2009 WL 9152972, at *3 ("[I]f Congress were attempting to make 1933 Act actions filed in state court removable to federal court, it could not have chosen a more incomprehensible way of doing so."). Congress did not do so, and the Court should not rewrite the statute to effect that result based on the government's speculation.

CONCLUSION

For the foregoing reasons, and the reasons stated in respondents' brief, the decision below should be affirmed.

Respectfully submitted,

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